Awaluddin bin Suratman & Ors v Pendakwa Raya

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NOS CR 52-36-88,52-37-88 AND 52-39-88
MOHTAR ABDULLAH J
6 MAY 1991

Criminal Procedure *— Trial — Accused unrepresented — Duties of trial judge — Trial judge to explain to unrepresented accused principal points in prosecution evidence — Trial judge to inform unrepresented accused of his right to object to admission of cautioned statement — Whether there was mistrial — Criminal Procedure Code (FMS Cap 6) s 257(1)*

Criminal Procedure *— Trial — Adjournment — Defence counsel retained after commencement of trial — Defence counsel applied for adjournment to obtain notes of evidence — Whether adjournment was in interest of justice — Whether adjournment necessary to enable defence counsel to prepare defence*

Criminal Procedure *— Retrial — Earlier trial declared a mistrial — Accused imprisoned since conviction at earlier trial — Whether appellate court should order retrial*

The first accused was charged with four counts of forging cheques which is punishable under s 467 of the Penal Code (FMS Cap 45). The second and third accused were jointly charged on one count of abetting one Basharihafi in the commission of dishonestly using as genuine one of the forged cheques and on three counts of abetting one Nasri in the commission of dishonestly using as genuine the three other forged cheques. The three accused were tried jointly at the sessions court. The first and third accused were represented by counsel who later discharged himself before the close of the prosecution case. Despite this, the sessions court judge proceeded with the trial and the prosecution immediately called a police officer as a prosecution witness to tender the first accused's oral cautioned statement, in which he had confessed to the forgery. Counsel then informed the court that he would continue to act for the first and third accused. Counsel objected to the admission of the cautioned statement. A trial-within-a-trial was held, at the conclusion of which the cautioned statement was admitted in evidence. The prosecution also sought to introduce the third accused's cautioned statement. During the trial-within-a-trial, in respect of the third accused's cautioned statement, counsel again discharged himself from acting for the first accused but continued to act for the third accused. The cautioned statement of the third accused was also accepted in evidence. Another counsel appeared for the first accused, who applied for a short adjournment to study the notes of proceedings. The application was not granted. This counsel subsequently also discharged himself from acting for the first accused. Counsel for the third accused also did not turn up to conduct the rest of the trial. Only the second accused was represented during the trial. The sessions court judge called for the defence of the

three accused. The first accused elected to remain silent while the second and third accused gave statements from the dock. The three accused were convicted on all charges. The first accused appealed to the High Court against sentence, while the second and third accused appealed against sentence and conviction. The first accused had been imprisoned for more than three years before the appeal was heard. The second and third accused were granted a stay of execution of their imprisonment sentences.

Held, setting aside the convictions and sentences of the three accused and ordering a retrial for the second and third accused:

(1) The trial judge should have refrained the prosecution from introducing the first accused's cautioned statement until it was ascertained whether the first accused was objecting to its admission. The trial judge should have informed the first accused of his right to object to the admission of his cautioned statement and not allow the prosecution to take an unfair or undue advantage over an undefended accused person. A trial-within-a-trial was not a proceeding to regularize or justify the admission of a cautioned statement that had already been recorded in evidence.

(2) Although the court should be strict in dealing with application for postponement, the court owes a duty to an accused person to ensure that he has the benefit of counsel who would be properly able to act on his behalf. Since counsel had just been retained for the first accused, a short adjournment would further the interest of justice as counsel needed the notes of evidence to be properly prepared to safeguard the accused's interest.

(3) The appeal record did not show whether the sessions court judge had complied with s 257(1) of the Criminal Procedure Code (FMS Cap 6) by calling the attention of the undefended accused to the principal points in the prosecution evidence in order for them to have an opportunity to explain. The appeal record also did not show that the sessions court judge had explained to the unrepresented accused the main points of the prosecution witness's testimony so as to enable them to cross-examine such a witness properly.

(4) Even without considering the merits in this case, there was a mistrial because the trial had not been conducted in accordance with proper procedure, fairness and justice.

(5) In respect of the first accused, the court would exercise its power of revision and quash his conviction. A retrial would not be fair and proper in his case considering his imprisonment since his conviction. The first accused was accordingly acquitted and discharged.

(6) Although the second accused had the benefit of counsel, in view of the fact that there was a joint trial and incriminating evidence implicating him was contained in the cautioned statements of the first and third accused, the second accused's conviction would also be tainted.

[Bahasa Malaysia summary

Si tertuduh pertama telah didakwa atas empat tuduhan merekapalsu cek yang boleh dihukum di bawah s 467 Kanun Keseksaan (FMS Bab 45). Si tertuduh kedua dan ketiga telah didakwa bersama atas satu tuduhan bersubahat dengan satu Basharihafi dalam perlakuan menggunakan dengan tidak jujur sebagai tulen satu daripada cek yang direkapalsu itu dan atas tiga tuduhan bersubahat dengan satu Nasri dalam perlakuan menggunakan dengan tidak jujur sebagai tulen tiga cek lain yang direkapalsu. Ketiga-tiga si tertuduh telah dibicarakan bersama di mahkamah sesyen. Si tertuduh yang pertama dan ketiga telah diwakili oleh peguambela yang kemudiannya melepaskan dirinya sebelum kes pihak pendakwa ditutup. Walau bagaimanapun hakim mahkamah sesyen meneruskan perbicaraan dan pihak pendakwa dengan serta-merta memanggil seorang pegawai polis sebagai saksi pendakwa untuk mengemukakan pernyataan beramaran lisan si tertuduh pertama dalam mana beliau telah mengaku salah akan rekaanpalsu itu. Peguambela kemudiannya memberitahu mahkamah bahawa beliau akan meneruskan perwakilan bagi si tertuduh pertama dan ketiga. Peguambela telah membantah terhadap penerimaan pernyataan beramaran itu. Satu perbicaraan dalam satu perbicaraan telah dijalankan yang mana akhirnya pernyataan beramaran itu telah diterima dalam keterangan. Pihak pendakwa juga telah mencuba untuk mengemukakan pernyataan beramaran si tertuduh ketiga. Semasa perbicaraan dalam satu perbicaraan berkenaan dengan pernyataan beramaran si tertuduh ketiga itu, peguambela sekali lagi melepaskan dirinya daripada mewakili si tertuduh pertama tetapi terus mewakili si tertuduh ketiga. Pernyataan beramaran si tertuduh ketiga juga diterima dalam keterangan. Peguambela yang lain telah mewakili si tertuduh pertama dan beliau telah memohon untuk mendapatkan penangguhan yang singkat untuk meneliti nota prosiding. Permohonan itu tidak diberikan. Peguambela ini kemudiannya juga melepaskan dirinya daripada mewakili si tertuduh pertama. Peguambela bagi si tertuduh ketiga juga tidak hadir untuk menjalankan baki perbicaraan itu. Hanya si tertuduh kedua telah diwakili semasa perbicaraan. Hakim mahkamah sesyen memanggil pembelaan ketiga-tiga si tertuduh. Si tertuduh pertama telah memilih untuk berdiam diri sedangkan si tertuduh kedua dan ketiga memberi pernyataan dari kandang orang salah. Ketiga-tiga si tertuduh telah disabitkan atas semua tuduhan. Si tertuduh pertama telah merayu kepada Mahkamah Tinggi terhadap hukuman sedangkan si tertuduh kedua dan ketiga merayu terhadap hukuman dan sabitan. Si tertuduh pertama telah dipenjarakan selama lebih daripada tiga tahun sebelum rayuannya telah didengar. Si tertuduh kedua dan ketiga telah diberikan penggantungan pelaksanaan atas hukuman pemenjaraan mereka.

Diputuskan, mengetepikan sabitan dan hukuman ketiga-tiga si tertuduh dan memerintahkan perbicaraan semula untuk si tertuduh kedua dan ketiga:

(1) Hakim perbicaraan sepatutnya menahan pihak pendakwa daripada mengemukakan pernyataan beramaran si tertuduh pertama sehingga ia telah dipastikan sama ada si tertuduh pertama membantah terhadap penerimaannya. Hakim perbicaraan sepatutnya memberitahu si tertuduh pertama tentang haknya untuk membantah terhadap penerimaan pernyataan beramarannya dan tidak membenarkan pihak pendakwa untuk mengambil faedah yang tidak adil dan tidak wajar atas si tertuduh yang tidak dibela. Suatu perbicaraan dalam satu perbicaraan bukanlah prosiding untuk membuat supaya teratur atau mempertahankan penerimaan satu pernyataan beramaran yang telah pun direkodkan dalam keterangan.

(2) Walaupun mahkamah sepatutnya berlaku tegas terhadap permohonan untuk penangguhan, mahkamah terhutang kewajipan kepada si tertuduh untuk menjamin yang dia mempunyai faedah peguambela yang benar-benar boleh mewakilinya. Oleh kerana peguambela baru sahaja diambil khidmat untuk si tertuduh pertama, penangguhan yang singkat akan menjayakan kepentingan keadilan kerana peguambela mengkehendaki nota keterangan untuk membolehkannya benar-benar bersedia melindungi kepentingan si tertuduh itu.

(3) Rekod rayuan tidak menunjukkan sama ada hakim mahkamah sesyen telah mematuhi s 257(1) Kanun Acara Jenayah (FMS Bab 6) dengan memanggil perhatian si tertuduh yang tidak dibela kepada perkara utama dalam keterangan pihak pendakwa supaya mereka mempunyai peluang untuk memberi penjelasan. Rekod rayuan juga tidak menunjukkan bahawa hakim mahkamah sesyen telah memberi penjelasan kepada si tertuduh yang tidak diwakili tentang perkara utama testimoni saksi pendakwa supaya mereka boleh memeriksa balas saksi tersebut dengan betul.

(4) Tanpa menimbangkan merit dalam kes ini sekalipun, perbicaraan yang tidak sah telah berlaku kerana perbicaraan itu telah tidak dijalankan mengikut prosedur wajar, kesaksamaan dan keadilan.

(5) Berkenaan dengan si tertuduh pertama, mahkamah akan menjalankan kuasa penyemakan dan membatalkan sabitannya. Perbicaraan semula tidaklah adil dan berpatutan dalam kes ini memandangkan pemenjaraannya sejak sabitannya itu. Maka si tertuduh pertama telah dibebaskan dan dilepaskan.

(6) Walaupun si tertuduh kedua mempunyai faedah peguambela, memandangkan fakta yang perbicaraan bersama telah dijalankan dan keterangan yang menunjukkan beliau bersalah terkandung di dalam pernyataan beramaran si tertuduh pertama dan ketiga, sabitan si tertuduh kedua juga tercemar.]

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 257(1)
Evidence Act 1950 ss 27, 157
Penal Code (FMS Cap 45) ss 109, 467, 471

Rajindar Singh (*Atma Singh Veriah & Co*) for the first and third appellants. A

Charanjit Singh (*CS Saini & Assoc*) for the second appellant.

Ng Aik Guan (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult B

Mohtar Abdullah J: Oleh kerana perbicaraan di mahkamah sesyen dijalankan dalam Bahasa Inggeris, dan segala rekod rayuan (iaitu nota-nota keterangan dan penghakiman oleh hakim mahkamah sesyen) adalah dalam bahasa Inggeris juga, maka saya menggunakan budi bicara saya untuk menyampaikan penghakiman ini dalam Bahasa Inggeris untuk memudahkan C rujukan kepada nota-nota keterangan dan penghakiman berkenaan.

The first appellant was charged on four counts under s 467 Penal Code (FMS Cap 45) ('the Code') for forging four MBB cheques belonging to MPPJ (hereinafter referred to as 'the forged cheques') to a total value of $1,956,700.

The second and third appellants were jointly charged as follows: D

(a) on one count under ss 109/471 of the Code for abetting one Basharihafi bin Abdul Rashid in the commission of dishonestly using as genuine one of the forged cheques; and

(b) on three counts under ss 109/471 of the Code for abetting one Mohamed Nasri bin Mansor in the commission of dishonestly using as genuine E the three other forged cheques.

On the application by the learned deputy public prosecutor, the learned sessions court judge ordered a joint trial for all three appellants. All three appellants were subsequently found guilty and convicted on all the charges preferred against them. The appellants were sentenced to imprisonment for F concurrent terms ranging from four years to seven years. The first appellant was fined a total of $20,000 while the second and third appellants were fined a total of $18,000 each.

The first appellant has now appealed against sentence, while the second and third appellants appealed against both conviction and sentence. At this G appeal the second appellant is represented by Mr Charanjit Singh — in the sessions court he was represented by Mr A Anthony. The first and third appellants were represented by a Mr Bernatt who at various stages during the trial had discharged himself, later acted again for these two appellants and subsequently discharged himself towards the end of the trial. I shall be commenting on this later in my judgment. When this appeal was first H mentioned on 27 April 1991 the first appellant was unrepresented. In fact he filed his appeal papers from prison. The third appellant is now represented by Mr Rajindar Singh, who has also kindly agreed to act for the first appellant in this appeal. The same learned deputy public prosecutor appeared both at the trial and at this appeal on behalf of the public prosecutor. I I subsequently heard this appeal on 2 May 1991.

Let me, at the outset, say that certain aspects of this trial are quite disturbing and I had accordingly reserved judgment to today to enable me to carefully ponder on these unsatisfactory features of the trial. In the

course of this judgment, I shall refer extensively to the notes of evidence contained in the appeal record.

After eight prosecution witnesses had given evidence, the record shows as follows at p 66 of the appeal record:

2 March 1987:	OKT 1 dan 2 hadir.
	TPR Mr Ng.
	Alex Anthony bagi OKT 1.
Court:	Ditanggohkan sekejap.
	Sgd (Sessions court judge)
	Mahkamah bersidang semula.
	Ketiga OKT hadir.
	TPR Mr Ng.
	A Anthony bagi OKT 2.
	Ms Thong holding watching brief.
	Peguambela OKT 1 dan 3 tidak hadir.
OKT 3:	Saya ada menerima salinan surat daripada Encik Bernatt mengatakan dia ingin menarik diri untuk membela kes ini.
OKT 1:	Saya belum menerima salinan surat daripada peguambela saya.
PW9:	Chief Inspector KS Nathan affirmed, states in English.

From the above-mentioned notes it is clear that although counsel for the first and third appellants was absent and had indicated he would be discharging himself, the learned sessions court judge proceeded with the trial in the absence of any counsel for the two appellants. The record does not show whether the two appellants applied for a postponement to seek the continued service of Mr Bernatt or to seek new counsel(s) to defend them. The learned deputy public prosecutor immediately called his most important witness, his star witness, Chief Inspector KS Nathan (PW9), the investigating officer of this case. The learned deputy public prosecutor promptly introduced into evidence that PW9 arrested the first appellant on 21 July 1983 at the MPPJ Office in Petaling Jaya and that after being cautioned under s 113 Criminal Procedure Code (FMS Cap 6) ('the CPC'), the first appellant made an oral cautioned statement confessing to the theft of four spoiled or cancelled cheques, writing out these cheques and forging the signatures of the president and treasurer of the MPPJ. The contents of the oral cautioned statement of the first appellant were given in evidence through PW9. In fairness to the first appellant, who was without counsel then and who may not (as apparent in this case) have known or understood his rights to object to the admission of the said oral cautioned statement, the learned deputy public prosecutor should have refrained from proceeding with the testimony of PW9 at this stage. The learned sessions court judge, in fairness to the first appellant, should have restrained the learned deputy public prosecutor from introducing the contents of the cautioned statement until after she had ascertained from the first appellant whether he was objecting or not to the admission of the said oral cautioned statement. Though there is no procedural requirement for the learned sessions court judge to inform an unrepresented accused person of his right to object to the admission of such statement, the learned sessions court judge should have realized that the question of admissibility of a document

or statement is a legal issue which a layman does not comprehend. In fact many a lawyer blunder on this issue! Where an accused person is without counsel, the duty of a trial judge to hold a fair and even balance between the prosecution and the undefended accused person is even more difficult and onerous. In such a situation, a trial judge must not allow the prosecution to take an unfair or undue advantage over an undefended accused person like the first appellant whose counsel had abandoned him in his greatest hour of need!

The learned counsel for the second appellant who was present throughout the proceeding merely kept quiet. The record does not show him to act as an officer of the court to bring to the learned session court judge's attention the dire predicament of the first appellant. It was only at the stage when PW9 said that all the forged cheques were handed over to the second appellant did the learned counsel for the second appellant make an objection, as regards that part of the evidence affecting his client. It was also at this stage that the first and third appellants applied to the court to seek the service of their counsel. At pp 68–69 of the appeal record:

A Anthony:	I wish to make objection as regards to this part of the evidence — needs time to do so.
OKT 1 dan 3:	Memohon untuk menemui peguambela saya untuk memastikan perkara ini.
Court:	Sambung bicara pada petang esok pukul 2.15 petang. Sgd (Sessions court judge)
TPR:	Applying to have bail cancelled against the first and third accused. First accused — $20,000 and one surety, third accused $20,000 and two sureties.
A Anthony:	If bail is cancelled it would be more difficult for them to contact their lawyer. They have been attending court regularly. IO confirmed that the passports of the third and second accused are in his custody. First accused does not have any passport.
Court:	Application by the prosecution refused. Sgd (Sessions court judge)

I quote the above passages to show also the attitude of the leaned deputy public prosecutor. Instead of showing compassion for the two appellants who were merely seeking time to obtain the service of counsel, the learned deputy public prosecutor sought to cancel their bail. The record does not show his reasons for doing so. It would, however, be apparent to anyone with sufficient common sense to realize that, with their bail revoked, the two appellants, who would then be remanded in custody, would have great difficulty in contacting counsel. As I said before, the learned deputy public prosecutor must be fair and not take undue advantage of the two appellants who were left stranded high and dry by their counsel. This application by the learned deputy public prosecutor to revoke the bail of the two appellants indicates a harsh attitude on the part of the prosecution that is clearly not in consonant with justice and fairplay.

On the next day when the trial resumed, Mr Bernatt appeared and informed the court that his clients had requested him to continue to act for them and that he was agreeable to do so. No reason was given to the court as to why he was absent the previous day or why he had discharged himself

A then. No apology was tendered as to his absence the previous day. He applied for the notes of evidence and the case was adjourned to enable both the prosecution and defence to be supplied with the relevant notes of evidence. On 25 March 1987 when the trial resumed, Mr Bernatt objected to the admission of the said oral cautioned statement of the first appellant. The learned sessions court judge then ordered for a trial-within-a-trial to be B held to determine admissibility of the oral cautioned statement which had already been recorded in evidence. At the end of a lengthy trial-within-a-trial, the learned sessions court judge ruled that the said oral cautioned statement was admissible in evidence. She also ruled that the investigation diary of PW9 containing the record of the said statement be admitted in C evidence under s 157 of the Evidence Act 1950 to corroborate the oral testimony of PW9 regarding the first appellant's cautioned statement.

The whole of the prosecution case against the first appellant rested on this cautioned statement — without it the prosecution had no case at all against the first appellant. Apart from my comments as to the conduct of the learned deputy public prosecutor, the learned defence counsel (Mr D Bernatt) and also the learned sessions court judge, I am also of the view that the subsequent trial-within-a-trial conducted after the disputed cautioned statement had been tendered in evidence is improper and not in accordance with law. A trial-within-a-trial is conducted to determine the admissibility of a cautioned statement. It is not a proceeding to regularize or justify the E admission of the statement that had already been recorded in evidence!

On 17 November 1987, in the course of a trial-within-a-trial to determine the admissibility of a written cautioned statement by the third appellant, Mr Bernatt again played his disappearing act. At pp 122–123 of the appeal record:

F	17 November 1987	Ketiga OKT hadir. DPP Mr Ng. Alex Anthony — peguambela OKT 2.
	OKT 3:	Saya diberitahu oleh Encik Bernatt bahawa beliau mempunyai kecederaan pada kakinya — tidak boleh hadir ke mahkamah.
G	DPP:	Since counsel has written in to court that he has discharged himself as counsel and no change in respect of his contention has been indicated to the court, the prosecution is ready to proceed with the case.
	Anthony:	I have not been in communication with Mr Bernatt. May the case be stood down for a day.
H		Court has not received any call from Mr Bernatt to clarify as to the position (interpreters have not received any call).
	Court:	To proceed with the hearing of this case. Sgd (Sessions court judge)
	OKT:	Jika betul peguambela menarik diri saya ingin mencari peguambela yang baru.
I	Court:	Penanggohan tidak dibenarkan. Sgd (Sessions court judge)

Chief Inspector Nathan was called as EW2 (EW1 being WI Hamison bte Buyong, PW10, who recorded the third appellant's cautioned statement).

After the examination-in-chief of EW2, the record, at p 124, shows as follows:

Cross-examination:
OKT 1: Saya tidak memahami. Saya tidak dapat memberi keputusan.
Cross-examination (by Mr Anthony):
Nil.
Cross-examination:
OKT 3: Saya memilih untuk berdiam sehingga mendapat peguambela yang baru.

The learned sessions court judge ordered the case to be stood down (ie adjourned to the next day (18 November 1987). On the said date, the third appellant produced a letter from Mr Bernatt, requesting for a postponement. Finally, on 4 January 1988, a Mr Vadiveloo appeared for the first appellant while Mr Bernatt appeared and remained as counsel for the third appellant. At p 125 of the appeal record:

Vadiveloo: Due to some conflict the first accused was asked to get a new solicitor and I have just been retained. Request for a short adjournment to enable me to obtain the notes of evidence.
Mr Ng: Objecting to this application for another postponement —

(1) What is the conflict between the accused?
(2) When the matter came up in November 1987 and two days set aside, parties informed case would proceed with or without counsel.

In the light of the previous proceeding this is another attempt to protract the proceeding.
Court: Request for adjournment not allowed.
Sgd (Sessions court judge)
DPP: I am now calling my second inquiry witness for cross-examination.

In my view, as Mr Vadiveloo had just been retained, a short adjournment would further the interest of justice as Mr Vadiveloo needed the notes of evidence to be better and properly prepared to safeguard the interests of the first appellant. Though the court should be strict in dealing with applications for postponements, the court owes a duty, too, to an accused person to ensure that he has the benefit of counsel who would be properly able to act on his behalf. (Later turn of events shows that the first appellant would soon be abandoned by his second counsel, and once again he would fall back into the arms of Mr Bernatt who would disappoint him yet again.)

Chief Inspector Nathan, EW2, was then cross-examined by Mr Bernatt. There was no cross-examination done by Mr Anthony and Mr Vadiveloo (see p 128). When the case for the prosecution in respect of the trial-within-a-trial was closed, the defence called the third appellant (DEW1) to testify. After hearing submission of all parties, the learned sessions court judge ruled that the cautioned statement of the third appellant be admissible in evidence (p 147). WI Hamison (PW10) was recalled and the said cautioned statement was then tendered and marked as P57.

A On 29 March 1988, the record shows that Mr Vadiveloo had discharged himself and Mr Bernatt again acted for the first appellant. At p 152 of the appeal record:

29 March 1988:	Ketiga OKT hadir. DPP Mr Ng. Ms Thong holding watching brief for MBB.
OKT 1:	Peguambela saya Encik Vadiveloo menarik diri dan sekarang Encik Bernatt peguambela saya. Dia tidak dapat hadir hari ini sebab berada di Mahkamah Tinggi.
OKT 3:	Encik Bernatt berada di Mahkamah Tinggi sebab ada kes 'election petition'.
Mr Alex:	Encik Bernatt tidak ada menghubungi saya tentang perkara ini.
Mahkamah:	Tidak ada menerima surat atau panggilan daripada Encik Bernatt.
Mr Ng:	Objection to request for further postponement — court record shows concessions made by prosecution to ensure accused given ample opportunities for fair representation. Indeed counsel acting for first and third accused to keep these dates opened and to be followed by submission. Prosecution has three witnesses — formal, and after this to proceed with submission.
Court:	Postponement not allowed.

Again, the first and third appellants were left stranded without counsel when the court proceeded with the trial. PW13, PW14 and finally PW15 gave evidence, after which the prosecution closed its case. The case was adjourned to 11 April 1988 for submission. On the said date, Mr Bernatt again failed to appear in court. At p 158 of the appeal record:

11 April 1988:	Ketiga OKT hadir. Mr A Anthony peguambela OKT 2. PO ASP Chong menyebut bagi pihak DPP Mr Ng. Mr Bernatt tidak hadir.
PO:	Mr Ng engaged in an important matter and he has instructed me to record the submission made.
Mr Anthony:	I have been informed by Mr Bernatt that he is no longer acting for the first and third accused. I do not know whether he has sent any letter to that effect.
Third accused:	I have not been informed by my counsel that he has discharged himself.
Court:	Stand down for a short while to enable first and third accused to contact Mr Bernatt. Sgd (Sessions court judge)
	Case called again.
Third accused:	I contacted Mr Bernatt, he is still my counsel but not able to come to court today or tomorrow. He requested for a week's adjournment.
Court:	A week's postponement is not allowed — either to be present in court tomorrow morning to give the submissions or court would proceed to give the decision since the hearing dates of this case has been fixed long ago. Sgd (Sessions court judge)

With that, the trial proceeded. Mr Anthony then made his submission on behalf of the second appellant. The case was then adjourned to the next day (12 April 1988). At pp 160–161 of the appeal record:

12 April 1988: Ketiga OKT hadir.
DPP Mr Ng.
Alex Anthony peguambela OKT 2.
Mr Bernatt peguambela OKT 1 dan 3 tidak hadir.
OKT 1 dan 3 mengesahkan bahawa peguambela mereka tidak akan datang ke mahkamah pada hari ini.
OKT 1: Tidak akan memberi hujah-hujah kepada mereka.
OKT 3: Saya ingin memberi hujah-hujah saya.
Hujah-hujah OKT 3: I am making my own submission in view of the absence of my counsel Mr Bernatt. I am very much regret, sorry that the last minute performance of my counsel. Should not happened like this.

The third appellant then proceeded to make a brief submission. The learned deputy public prosecutor then made a lengthy submission in reply.

The learned sessions court judge held that the prosecution had established a prima facie case against all the three appellants and called them to enter their respective defence on all the charges against each of them respectively. After the three alternatives had been explained, the first appellant elected to remain silent, the second appellant elected to give evidence on oath while the third appellant is recorded to have said (at p 165): 'I have not decided to which alternative to take until obtained the advice of counsel.'

The trial was then adjourned to 13 April 1988. On the said day, the second appellant changed his mind and gave a statement from the dock. The first appellant still elected to remain silent, while the third appellant gave a statement from the dock. Both the first and third appellants were undefended at this stage. The record does not show whether s 257 of the CPC had been complied with. Section 257(1) reads:—

> At every trial before the court of a magistrate if and when the court calls upon the accused for his defence it shall, if he is not represented by an advocate, inform him of his right to give evidence on his own behalf, and if he elects to give evidence on his own behalf shall call his attention to the principal points in the evidence for the prosecution which tell against him in order that he may have an opportunity of explaining them.

It is also a salutary practice for a trial judge to explain to an undefended accused the main points of a prosecution witness's testimony so as to enable the said accused to properly cross-examine such witness. The record again does not show this to be done!

At the close of the case for the defence, the first appellant said that he did not want to make any submission. Mr Anthony then made a submission on behalf of his client (the second appellant). The third appellant merely said: 'My submission is as that given by counsel for the second appellant. I hope the court will consider all my statement.'

The learned deputy public prosecutor then replied with a lengthy submission. On 18 April 1988, all the three appellants were found guilty, convicted and sentenced as aforesaid.

A In my considered view, without even considering the merits of the various legal issues raised in this appeal, I am satisfied that there was a mistrial in this case. The record clearly shows that this trial had not been conducted in accordance with proper legal procedures or in a manner conducive to fairness and justice. The conduct of defence counsel, Mr Bernatt, is, to put it bluntly, quite disgraceful and has, to my mind, B prejudiced the interests of his clients, the first and third appellants. The courtroom is not a stage for counsel to play-act, to appear, disappear, reappear and disappear at his whim and fancy. A defence counsel is also an officer of the court — he owes a duty both to the court and to his client. If a defence counsel wants to discharge himself from further acting for an C accused person, the decent and honourable thing for him to do is to inform the court accordingly. Etiquette would demand that he appears in court to formally discharge himself. If that is somewhat difficult for him to do, then he should at least write to the court or inform the other counsel accordingly. I sincerely hope that the Bar Council or the Selangor and Federal Territory Bar Committee will seriously look into this matter and take appropriate D disciplinary action to protect the integrity of the honourable legal profession and the dignity of the courts.

As can be clearly seen from the record, the conduct and actions of the learned deputy public prosecutor and the learned sessions court judge are also not beyond reproach.

E It is trite observation that justice must not only be done but must be seen to be done. The record does raise some doubt whether, in the circumstances of this case, the appellants (especially the first and third appellants) have had a fair trial.

In that respect their conviction can be said to be tainted. Though the second appellant had the benefit of counsel throughout the trial, in view of F the fact that this was a joint trial and incriminating evidence implicating him were contained in the cautioned statements of the first and third appellants, I am of the view, too, that his conviction would be similarly tainted.

G *Decision*

(1) In respect of the first appellant, I exercise my power of revision and hereby quash the conviction of the first appellant on all the four charges against him and also set aside the various sentences of imprisonment and fines imposed on him.

H (2) As regards the third and second appellants, I allow their appeal against conviction and hereby quash their respective convictions on all the charges against them jointly and also set aside the various sentences and fines imposed on them.

(3) In view of the mistrial, the proper consequential order would be a retrial of the appellants before another sessions court judge. However, I there was no stay of execution of sentence in respect of the first appellant who had, by today, been in prison for three years 19 days since the date of his conviction on 18 April 1988. I do not think a retrial would be fair and proper in the special circumstances of this case. In view of this extenuating circumstance, I shall not order a retrial for the

first appellant. He is hereby acquitted and discharged and should forthwith be released.

(4) However, in respect of the second and third appellants, I order that they both be retried before a different sessions court judge on the joint charges against them. They are required to appear before the sessions court on 20 May 1991 for a date to be fixed for the retrial before another sessions court judge. Bail is extended for this purpose.

I purposely do not make any observation or ruling on the substantive legal issues relating to the admissibility of the various documents and statements, viz the cautioned statement of the third appellant, the information by the second appellant under s 27 of the Evidence Act 1950 and the records of the trial/conviction of Basharihafi and Mohd Nasri. These are best left to the new trial judge to decide, unfettered by any observation or ruling by me. A fresh trial, as the Supreme Court recently declared, means that everything should be started afresh and all evidence should therefore be tendered afresh and decided upon accordingly by the new trial judge.

Order accordingly.

Reported by Wong Kian Kheong